

ARTICLE 5. OFFICE OF THE OMBUDSMAN-CITIZENS AIDE

Article 5, consisting of Sections 41-1371 to 41-1383, was added by Laws 1995, Ch 281, Section 1, effective July 1, 1996.

Article 5, consisting of Sections 41-1371 to 41-1383, was amended by Laws 1997, Second Special Session, Ch 3, effective November 17, 1997.

Article 5, Section 41-1378 was amended by Laws 2000, Chapter 47, effective July 18, 2000

Article 5, Section 41-1378 was amended by Laws 2001, Chapter 261, effective August 9, 2001 and Laws 2001, Chapter 344, Effective October 1, 2001

41-1371. Definitions

In this article, unless the context otherwise requires:

1. "Administrative act" means an action, decision, omission, recommendation, practice, policy or procedure of an agency but does not include the preparation or presentation of legislation or the substantive content of a judicial order, decision or opinion.

2. "Agency" means a department, office, corporation, authority, organization, commission, council or board of the executive branch of state government, a department, office, institution, authority, organization, commission, committee, council or board of state government that is independent of the executive or legislative branches of state government or an officer, employee or member of an agency acting or purporting to act in the exercise of official duties. Agency does not mean the judicial department of state government, the board of regents, universities or community college districts.

3. "Record" means any document, photograph, film, exhibit or other item developed or received under law or in connection with the transaction of official business except an attorney's work product, communications that are protected under the attorney-client privilege and confidential information as defined in section 41-1378, subsection D, paragraph 4.

41-1372. Exemptions

This article does not apply to:

1. Any elected state official.
2. Chief advisors who maintain a direct, confidential and advisory relationship with:
 - (a) The governor.
 - (b) The secretary of state.
 - (c) The attorney general.
 - (d) The state treasurer.
 - (e) The state mine inspector.

- (f) The superintendent of public instruction.
- (g) A commissioner of the corporation commission.
- 3. An agency attorney who maintains an attorney-client relationship with either:
 - (a) An officer or employee of an agency acting in the exercise of the officer's or employee's duty.
 - (b) An elected official who is listed under paragraph 2.
- 4. The staff of the legislature.

41-1373. Ombudsman-citizens aide selection committee

A. When there is a vacancy in the office of ombudsman-citizens aide, or within twelve months before the expiration of the term of office, the ombudsman-citizens aide selection committee is established consisting of:

- 1. Two members of the senate appointed by the president of the senate. One member shall be from each political party.
- 2. Two members of the house of representatives appointed by the speaker of the house of representatives. One member shall be from each political party.
- 3. One public member who is appointed by the president of the senate and who represents a large business that is regulated by this state.
- 4. One public member who is appointed by the speaker of the house of representatives and who represents a small business that is regulated by this state.
- 5. Three members who are appointed by the governor and who represent:
 - (a) A consumer group that is not regulated by this state.
 - (b) State employees who hold managerial positions.
 - (c) State employees who hold nonmanagerial positions.

B. The appointing officers shall appoint the members of the committee when a vacancy occurs in the office of ombudsman-citizens aide. The committee shall receive applications and nominate by a two-thirds vote one candidate for ombudsman-citizens aide according to its adopted procedures. The appointment of the ombudsman-citizens aide from this nomination is made by passage of a bill on a roll call vote of two-thirds of the membership of each house of the legislature. Membership on the ombudsman-citizens aide selection committee expires when the appointment is approved. If the governor disapproves the bill, he shall return it to the house in which it originated. If after reconsideration, it again passes on a roll call vote of three-fourths of the membership of each house of the legislature, it shall become law notwithstanding the governor's objection.

C. Meetings of the committee are open to the public except for meetings to interview candidates and to make preliminary choices among the candidates. The meeting held to vote for the nominee is open to the public.

D. The identity of all candidates shall be public.

E. Committee members are eligible to receive reimbursement of expenses pursuant to title 38, chapter 4, article 2 but are not eligible to receive compensation.

41-1374. Qualifications

A person may not serve as ombudsman-citizens aide within one year of the last day the person served as a state elected officer. As minimum qualifications, the ombudsman-citizens aide shall be a resident of this state for at least six months, shall be at least twenty-five years of age and shall have investigatory experience.

41-1375. Ombudsman-citizens aide; term; compensation

A. The office of ombudsman-citizens aide is established.

B. The ombudsman-citizens aide who is appointed and approved under section 41-1373 shall serve full time and shall be a public officer subject to the conflict of interest provisions of title 38, chapter 3, article 8.

C. The term of office of the ombudsman-citizens aide is five years beginning on the date of appointment. Except as provided in subsection D of this section, the ombudsman-citizens aide shall not serve more than three full terms.

D. If the term of the ombudsman-citizens aide expires without the appointment of a successor, the incumbent ombudsman-citizens aide may continue in office until either:

1. A successor is appointed.

2. The ombudsman-citizens aide is removed from office pursuant to subsection E of this section.

E. The ombudsman-citizens aide may be removed from office at any time by a concurrent resolution approved by two-thirds of the membership of each house of the legislature, but only for neglect of duty, conviction of improperly divulging confidential information, misconduct or disability. The ombudsman-citizens aide may forfeit the office of ombudsman-citizens aide without legislative action pursuant to section 38-510. If the ombudsman-citizens aide is removed, resigns, dies or becomes incapacitated, a deputy ombudsman may serve as acting ombudsman-citizens aide until a new ombudsman-citizens aide is appointed.

F. The ombudsman-citizens aide is eligible to receive compensation as determined pursuant to section 38-611.

G. The ombudsman-citizens aide may incur, subject to appropriation, expenses that are necessary to carry out the duties under this chapter. The legislative council shall fund the expenses of the ombudsman-citizens aide from the monies appropriated to the council. The legislative council shall include the expenses as a line item in the general appropriations act.

41-1376. Powers and duties

A. The ombudsman-citizens aide shall:

1. Investigate the administrative acts of agencies pursuant to section 41-1377, subsections A and B except as provided in section 41-1377, subsections C, D and E. The ombudsman-citizens aide shall investigate the administrative acts of an agency without regard to the finality of the administrative act.

2. Annually before January 1 prepare a written report to the governor, the legislature and the public that contains a summary of the ombudsman-citizens aide's activities during the previous fiscal year. The ombudsman-citizens aide shall semiannually present this report before the legislative council. This report shall include:

(a) The ombudsman-citizens aide's mission statement.

(b) The number of matters that were within each of the categories specified in section 41-1379, subsection B.

(c) Legislative issues affecting the ombudsman-citizens aide.

(d) Selected case studies that illustrate the ombudsman-citizens aide's work and reasons for complaints.

(e) Ombudsman-citizens aide's contact statistics.

(f) Ombudsman-citizens aide's staff.

3. Before conducting the first investigation adopt rules that ensure that confidential information that is gathered will not be disclosed.

4. Appoint a deputy ombudsman and prescribe the duties of employees or, subject to appropriation, contract for the services of independent contractors necessary to administer the duties of the office of ombudsman-citizens aide. All staff serves at the pleasure of the ombudsman-citizens aide, and they are exempt from chapter 4, articles 5 and 6 of this title. All staff shall be subject to the conflict of interest provisions of title 38, chapter 3, article 8.

5. Before conducting the first investigation, adopt rules that establish procedures for receiving and processing complaints, including guidelines to ensure each complainant has exhausted all reasonable alternatives within the agency, conducting investigations, incorporating agency responses into recommendations and reporting findings.

6. Notify the chief executive or administrative officer of the agency in writing of the intention to investigate unless notification would unduly hinder the investigation or make the investigation ineffectual.

7. Appoint an assistant to help the ombudsman-citizens aide investigate complaints relating to child protective services in the department of economic security. The assistant shall have expertise in child protective services procedures and laws. Notwithstanding any law to the contrary, the ombudsman-citizens aide and the assistant have access to child protective services records and to any automated case management system used by child protective services in the department of economic security.

B. After the conclusion of an investigation and notice to the head of the agency pursuant to section 41-1379, the ombudsman-citizens aide may present the ombudsman-citizens aide's opinion

and recommendations to the governor, the legislature, the office of the appropriate prosecutor or the public, or any combination of these persons. The ombudsman-citizens aide shall include in the opinion the reply of the agency, including those issues that were resolved as a result of the ombudsman-citizens aide's preliminary opinion or recommendation.

41-1377. Scope of investigations

A. On receiving a complaint the ombudsman-citizens aide may investigate administrative acts of agencies that the ombudsman-citizens aide has reason to believe may be:

- 1. Contrary to law.**
- 2. Unreasonable, unfair, oppressive, arbitrary, capricious, an abuse of discretion or unnecessarily discriminatory, even though they may be in accordance with law.**
- 3. Based on a mistake of fact.**
- 4. Based on improper or irrelevant grounds.**
- 5. Unsupported by an adequate statement of reasons.**
- 6. Performed in an inefficient or discourteous manner.**
- 7. Otherwise erroneous.**

B. On receiving a complaint the ombudsman-citizens aide may investigate to find an appropriate remedy.

C. On receiving a complaint the ombudsman-citizens aide may refuse to investigate an administrative act of an agency that otherwise qualifies for investigation under subsection A of this section if:

- 1. There is presently available an adequate remedy for the grievance stated in the complaint.**
- 2. The complaint relates to a matter that is outside the duties of the ombudsman-citizens aide.**
- 3. The complaint relates to an administrative act that the complainant has had knowledge of for an unreasonable time period before filing the complaint.**
- 4. The complainant does not have a sufficient personal interest in the subject matter of the complaint.**
- 5. The complaint is trivial or made in bad faith.**
- 6. The resources of the office of ombudsman-citizens aide are insufficient to adequately investigate the complaint.**

D. The ombudsman-citizens aide shall refuse to investigate complaints filed by a person in the custody of the state department of corrections.

E. On receiving a complaint that involves confidential information as defined in section 42-108, the ombudsman-citizens aide shall either:

1. Work with the department of revenue problem resolution officer or an employee of the department of revenue who is authorized to access confidential taxpayer information.

2. Obtain a power of attorney from the taxpayer to access confidential information specific to the complainant in a form acceptable to the department of revenue.

F. On receiving a complaint that involves confidential information relating to section 36-2903, subsection J, section 36-2917, section 36-2932, subsection I or section 36-2972, the ombudsman-citizens aide shall either:

1. Work with the Arizona health care cost containment system administration employee who is authorized to access confidential information.

2. Obtain a power of attorney from the complainant to access confidential information specific to the complainant in a form acceptable to the Arizona health care cost containment system administration.

G. On receiving a complaint that involves confidential information relating to sections 36-507, 36-509 and 36-2220, the ombudsman-citizens aide shall either:

1. Work with the department of health services employee who is authorized to access confidential information.

2. Obtain a power of attorney from the complainant to access confidential information specific to the complainant in a form acceptable to the department of health services.

41-1378. Complaint; investigation; investigative authority; violation; classification

A. All complaints should be addressed to the ombudsman-citizens aide. Should an agency receive correspondence between a complainant and the ombudsman-citizens aide, it shall hold that correspondence in trust and shall promptly forward the correspondence, unopened, to the ombudsman-citizens aide.

B. Within thirty days of receipt of the complaint, the ombudsman-citizens aide shall notify the complainant of his decision to investigate or not to investigate the complaint. If the ombudsman-citizens aide decides not to investigate and if requested by the complainant, the ombudsman-citizens aide shall provide the reasons for not investigating in writing.

C. The ombudsman-citizens aide shall not charge any fees for investigations or complaints.

D. In an investigation, the ombudsman-citizens aide may:

1. Make inquiries and obtain information considered necessary subject to the restrictions in section 41-1377.

2. Enter without notice to inspect agency premises with agency staff on the premises.

3. Hold hearings.

4. Notwithstanding any other law, have access to all state agency records, including confidential records, except:

(a) Sealed court records without a subpoena.

- (b) Active criminal investigation records.
- (c) Records that could lead to the identity of confidential police informants.
- (d) Attorney work product and communications that are protected under the attorney-client privilege.
- (e) Confidential information as defined in section 42-108 except as provided in section 42-108, subsection D, paragraph 13.
- (f) Information protected by section 6103(d), 6103(p)(8) or 7213 of the internal revenue code.
- (g) Confidential information relating to section 36-2903, subsection J, section 36-2917, section 36-2932, subsection I or section 36-2972.
- (h) Confidential information relating to sections 36-507, 36-509 and 36-2220.

5. Issue subpoenas if necessary to compel the attendance and testimony of witnesses and the production of books, records, documents and other evidence to which the ombudsman-citizens aide may have access pursuant to paragraph 4 of this subsection. The ombudsman-citizens aide may only issue a subpoena if the ombudsman-citizens aide has previously requested testimony or evidence and the person or agency to which the request was made has failed to comply with the request in a reasonable amount of time.

E. It is contrary to the public policy of this state for any state agency or any individual acting for a state agency to take any adverse action against an individual in retaliation because the individual cooperated with or provided information to the ombudsman-citizens aide or the ombudsman-citizens aide's staff.

F. If requested by the complainants or witnesses, the ombudsman-citizens aide shall maintain confidentiality with respect to those matters necessary to protect the identities of the complainants or witnesses. The ombudsman-citizens aide shall ensure that confidential records are not disclosed by either the ombudsman-citizens aide or staff to the ombudsman-citizens aide. The ombudsman-citizens aide shall maintain the confidentiality of an agency record. With respect to requests made pursuant to title 39, chapter 1, article 2 or other requests for information, the ombudsman-citizens aide shall maintain all records that are received from a custodial agency in the same manner as the custodial agency would if it had received the request.

G. The ombudsman-citizens aide or any staff member or other employee of the ombudsman-citizens aide who knowingly divulges or makes known in any manner not permitted by law any particulars of any record, document or information for which the law restricts disclosure is guilty of a class 5 felony.

41-1379. Procedures after an investigation

A. If an opinion or recommendation of the ombudsman-citizens aide is critical of a person or agency, the ombudsman-citizens aide shall first consult with the person or agency before rendering the opinion or recommendation. A preliminary opinion or preliminary recommendation is confidential and shall not be publicly disclosed by any party.

B. The ombudsman-citizens aide shall report the ombudsman-citizens aide's opinion and recommendations to an agency, if the ombudsman-citizens aide finds, after investigation, that:

1. A matter should be further considered by that agency.
 2. A matter should be referred to the presiding officers of both houses of the legislature for further investigation or legislative action.
 3. A statute or rule on which an administrative act is based should be amended.
 4. An administrative act should be modified or canceled.
 5. Reasons should be given for an administrative act.
 6. There are no grounds or there are insufficient grounds for action by the agency.
 7. Any other action should be taken by the agency.
 8. The agency's action was arbitrary or capricious, constituted an abuse of discretion or was not according to law.
- C. The ombudsman-citizens aide may request the agency to notify the office within a specified time of any action taken on his recommendations.
- D. The ombudsman-citizens aide shall notify the complainant of the ombudsman-citizens aide's recommendations and the actions taken by the agency.
- E. If the ombudsman-citizens aide believes there is a breach of duty or misconduct by an officer or employee of an agency in the conduct of the officer's or employee's duty, the ombudsman-citizens aide shall refer the matter to the chief executive officer of the agency, to the presiding officer of both houses of the legislature, to a prosecutor's office or to another appropriate official or agency.

41-1380. Ombudsman-citizens aide protections

- A. A civil action may not be brought against the ombudsman-citizens aide or the staff of the ombudsman-citizens aide for any action or omission in performing the duties under this article except for gross negligence or intentional wrongful acts or omissions except as provided in title 38, chapter 3, article 8.
- B. A proceeding or decision of the ombudsman-citizens aide may be reviewed in superior court only to determine if it is contrary to this article.
- C. The ombudsman-citizens aide and the staff of the ombudsman-citizens aide shall not be required to testify in court regarding matters that come to their attention in the exercise of their duties except as may be necessary to enforce this article.
- D. Records and files maintained by the ombudsman-citizens aide are not public records and are exempted from title 39, Chapter 1. The information contained in these records and files that were prepared pursuant to an investigation conducted under this article are not subject to disclosure except to the attorney general or any county attorney in connection with an investigation that has been referred to the attorney general or a county attorney pursuant to section 41-1379. For the purposes of this subsection, "records and files" means all information the department gathers during the course of a child protective services investigation conducted under this article from the time a file is opened and until it is closed. Records and files does not include information that is contained in child welfare

agency licensing records.

41-1381. Ombudsman-citizens aide political activity

The ombudsman-citizens aide and the staff of the ombudsman-citizens aide may express a private opinion, may register to vote as to party and may vote but may not engage in any other political activity. If the ombudsman-citizens aide or any staff member or employee of the ombudsman-citizens aide becomes a candidate for political office, that person shall resign.

41-1382. Ombudsman-citizens aide office

The office of ombudsman-citizens aide shall not be located within the state office building complex or adjacent or contiguous to any other state agency.

41-1383. Violation; classification

A person who knowingly hinders the lawful actions of the ombudsman-citizens aide or the staff of the ombudsman-citizens aide or who knowingly refuses to comply with their lawful demands is guilty of a class 1 misdemeanor.

Historical and Statutory Notes

Sec. 5. Administrative procedures exemption

"The office of the ombudsman-citizens aide is exempt from the requirements of title 41, chapter 6, Arizona Revised Statutes, until July 1, 1997."

Sec. 7. Purpose

"the purpose of the office of the ombudsman-citizens aide is to service citizens' complaints by investigating the administrative acts of state agencies and to annually report to the governor, the legislature and the public on its activities."

Sec. 8. Legislative intent

"It is the intent of the legislature that the ombudsman-citizens aide shall assist the people of Arizona to enjoy public service of the highest quality from state agencies. The services of the ombudsman-citizens aide are available to all Arizona citizens."